

103 KAR 16:240. Nexus standard for corporations and pass-through entities.

RELATES TO: KRS 141.010, 141.040, 141.206.

STATUTORY AUTHORITY: KRS 131.130, 141.018, 141.050(4)

NECESSITY, FUNCTION, AND CONFORMITY: KRS 141.040(1) requires non-exempt corporations doing business in Kentucky to pay corporation income tax and file the required tax forms for that tax. KRS 141.206 requires pass-through entities doing business in Kentucky to file tax forms to compute the distribution of income to the partners, members or shareholders. KRS 131.130(1) authorizes the Department of Revenue to promulgate administrative regulations for the administration and enforcement of Kentucky's tax laws. KRS 141.018 requires the Department of Revenue to promulgate administrative regulations necessary to implement 2005 Ky. Acts ch. 168. KRS 141.010(25) defines "doing business in this state". This administrative regulation establishes what constitutes nexus in Kentucky under a doing business standard and provides examples.

Section 1. Definitions. (1) "Business situs" means in relation to intangible personal property:

- (a) The corporation's or pass-through entity's commercial domicile;
- (b) The place where the intangible personal property is utilized by the corporation or pass-through entity; or
- (c) The state where the intangible personal property is located if possession and control of the intangible personal property is localized in connection with a trade or business so that substantial use or value attaches to the property.

(2) "Commercial domicile" means the principal place from which the trade or business of the corporation or pass-through entity is managed.

(3) "Corporation" is defined by KRS 141.010(24).

(4) "Doing business in this state" is defined by KRS 141.010(25).

(5) "Foreign corporation" means a corporation incorporated or formed under the authority of another state or country.

(6) "Foreign pass-through entity" means a pass-through entity organized under the laws of another state or country.

(7) "Pass-through entity" is defined by KRS 141.010(26).

(8) "Owning or leasing property in this state" means owning or leasing real or tangible personal property in Kentucky, including:

- (a) Maintaining an office or other place of business in Kentucky;
- (b) Maintaining in Kentucky an inventory of merchandise or material for sale, distribution or manufacture, or consigned goods, regardless of whether kept on the taxpayer's premises, in a public or rented warehouse, or otherwise; or
- (c) Owning computer software used in the business of a third party within Kentucky.

(9) "Qualified real estate investment trust subsidiary" is defined by Section 856(i)(2) of the Internal Revenue Code, 26 U.S.C. 856(i)(2).

(10) "Qualified subchapter S subsidiary" is defined by Section 1361(b)(3)(B) of the Internal Revenue Code, 26 U.S.C. 1361(b)(3)(B).

(11) "Related corporation" means a corporation in which another corporation or pass-through entity maintains an ownership interest of fifty (50) percent or more during any portion of the taxable year.

(12) "Single member limited liability company" means a limited liability company with one (1) member.

Section 2. In General; Rules of Construction. (1) For purposes of the corporation income tax

imposed by KRS 141.040(1) and the filing requirement imposed on pass-through entities by KRS 141.206(2), the term "doing business in this state" or "doing business" shall be used in a comprehensive sense concerning the operation of any profit-seeking enterprise or activity in Kentucky.

(2) In determining if a corporation or pass-through entity is doing business in Kentucky, it shall be immaterial whether the activities actually result in a profit or loss.

(3) Whether a corporation or pass-through entity is doing business in Kentucky shall be determined by the facts in each case.

(4) Whether the activities of a foreign corporation or pass-through entity fall within the scope of "solicitation" within the meaning of Pub.L. 86-272, codified as 15 U.S.C. 381 to 384, shall be a factual determination. The examples in Sections 3 and 4 of this administrative regulation shall be used as guidelines. In applying the guidelines to the particular circumstances and activities of a foreign corporation or pass-through entity, the Department of Revenue shall employ the following rules of construction:

(a) The effect of the activities listed in Sections 3 and 4 of this administrative regulation shall be cumulative. In determining whether a taxpayer is doing business in Kentucky, all of these activities shall be considered as a whole.

(b) If the Department of Revenue determines that a taxpayer is doing business in Kentucky, the taxpayer shall carry the burden of substantiating any claim that these activities in Kentucky do not constitute doing business under either Pub.L. 86-272, codified as 15 U.S.C. 381 to 384, or the United States Constitution.

(c) Documentary evidence shall be given substantial weight in establishing the nature and extent of the taxpayer's activities. Affidavits or other evidence not contemporaneous with the events in question shall be given little weight.

(d) The term "solicitation" shall include only actual requests for purchases and activities that are entirely ancillary to requests for purchases. An activity shall be considered entirely ancillary to the requesting of purchases if it serves no independent business purpose apart from its connection to the soliciting of orders.

(e) Activities conducted by a foreign corporation or pass-through entity with respect to a particular order shall not constitute "solicitation" if the activity occurs after the order has been placed.

Section 3. Exception for Solicitation Activities Protected by Pub.L. 86-272, codified as 15 U.S.C. 381 to 384. (1) General; preemption of state law. This administrative regulation adopts a narrow interpretation of the immunity afforded by Pub.L. 86-272, codified as 15 U.S.C. 381 to 384, which precludes the imposition of Kentucky income tax upon a foreign corporation, or the filing requirement imposed on foreign pass-through entity, if the corporation's or pass-through entity's sole activity in Kentucky is the corporation's or pass-through entity's representatives soliciting orders for the sale of tangible personal property in the name of the corporation or pass-through entity or in the name of a prospective customer if the orders are:

(a) Sent outside of Kentucky for approval or rejection; and

(b) Filled by shipment or delivery from a point outside of Kentucky.

(2) Scope of Pub.L. 86-272, codified as 15 U.S.C. 381 to 384.

(a) If a corporation or pass-through entity engages both in protected solicitation activities and in any other activity that is not a protected solicitation activity, it shall not claim the immunity granted by Pub.L. 86-272, codified as 15 U.S.C. 381 to 384.

(b) Solicitation of orders shall not be protected by Pub.L. 86-272, codified as 15 U.S.C. 381 to 384, if the solicitation is for the:

1. Sale or provision of services; or

2. Sale, lease, rental, license, or other disposition of real property or intangibles.

(3) Activities normally considered to be solicitation. The activities listed in this subsection shall serve as examples of activities that ordinarily fall within the scope of "solicitation" under Pub.L. 86-272, codified as 15 U.S.C. 381 to 384:

(a) Soliciting orders through advertising;

(b) Carrying samples and promotional materials only for display or distribution without charge or other consideration;

(c) Soliciting orders by an in-state resident employee or representative of the company, if that person does not maintain or use any office or other place of business in the state other than an "in-home" office as described in subsection (4) of this section;

(d) Furnishing and setting up display racks and advising customers on the display of the company's products without charge or other consideration;

(e) Checking customer inventories for reorder without a charge therefore, but not for other purposes such as quality control;

(f) Recruiting, training or evaluating sales personnel, including occasionally using homes, hotels, or similar places for meetings with sales personnel;

(g) Conducting solicitation activities from an employee's in-home work space, if the use of the space is not paid for by the company;

(h) Performing missionary sales activities, including the solicitation of indirect customers for the company's goods. For example, a manufacturer's solicitation of retailers to buy the manufacturer's goods from the manufacturer's wholesale customers would be protected if the solicitation activities are otherwise immune;

(i) Coordinating shipment or delivery without payment or other consideration and providing information relating thereto either prior or subsequent to the placement of an order;

(j) Maintaining a sample or display area for an aggregate of fourteen (14) calendar days or less at any one (1) location within Kentucky during the tax year, if no other activities inconsistent with solicitation take place;

(k) Mediating direct customer complaints if the purposes are solely to ingratiate sales personnel with the customer and facilitate requests for orders;

(l) Passing orders, inquiries, and complaints on to the home office;

(m) Providing automobiles to sales personnel for use solely in solicitation activities; and

(n) Owning, leasing, using, or maintaining personal property for use in the employee or representative's "in-home" office or automobile that is solely limited to the conducting of solicitation activities. The use of personal property, such as a cellular telephone, facsimile machine, duplicating equipment, personal computer, or computer software that is limited to the carrying on of protected solicitation and activity entirely ancillary to solicitation or permitted by this section shall not, by itself, remove the protection.

(4) Activities that are not solicitation. The activities listed in this subsection shall serve as examples of activities in this state that fall outside the scope of "solicitation" and are not protected by Pub.L. 86-272, codified as 15 U.S.C. 381 to 384 unless the activity is de minimis within the meaning of Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co., 112 S.Ct. 2447 (1992):

(a) Making repairs or providing maintenance or service to the property sold or to be sold;

(b) Installing or supervising installation at or after shipment or delivery;

(c) Collecting current or delinquent accounts, whether directly or by third parties, through assignment or otherwise;

(d) Investigating credit;

(e) Repossessing property;

(f) Conducting training courses, seminars, or lectures for personnel other than personnel in-

volved only in solicitation;

(g) Investigating, handling, or otherwise assisting in resolving customer complaints, other than mediating direct customer complaints if the sole purpose of the mediation is to ingratiate the sales personnel with the customer;

(h) Approving or accepting orders;

(i) Securing deposits on sales;

(j) Picking up or replacing damaged or returned property, including stale or unsaleable property;

(k) Maintaining a sample or display area for an aggregate of fifteen (15) days or more at any one location within Kentucky during the tax year;

(l) Providing technical assistance or service, including engineering assistance or design service, if one (1) of the purposes of it is other than the facilitation of the solicitation of orders;

(m) Hiring, training, or supervising personnel for activities other than solicitation;

(n) Using agency stock checks or any other instrument or process by which sales are made within this state by sales personnel;

(o) Carrying samples for sale, exchange, or distribution in any manner for consideration or other value;

(p) Providing shipping information and coordinating deliveries;

(q) Supervising the operations of a franchisee or similar party;

(r) Monitoring, inspecting, or approving work performed by an independent contractor under a warranty or similar contractual arrangement;

(s) Consigning stock of goods or other tangible personal property for sale to any person, including an independent contractor;

(t) Fulfilling sales orders by shipment or delivery from a point within Kentucky;

(u) Owning, leasing, maintaining, or otherwise using as part of the business operations in Kentucky any of the following facilities or property:

1. Repair shop;

2. Parts department;

3. Warehouse;

4. Meeting place for directors, officers, or employees;

5. Stock of goods other than samples for sales personnel or that are used entirely ancillary to solicitation; or

6. Telephone answering service that is publicly attributed to the company or to an employee or agent of the company in their representative status;

(v) Maintaining, by any employee or other representative, an office or place of business of any kind other than an in-home office. For the purpose of this subsection it shall not be relevant whether the company pays directly, indirectly, or not at all for the cost of maintaining the in-home office. An office shall be considered in-home if it is located within the residence of the employee or representative, and:

1. Is not publicly attributed to the company or to the employee or representative of the company in an employee or representative capacity. Factors considered in determining if an office is publicly attributed to the company or to the employee or representative of the company in an employee or representative capacity shall include:

a. A telephone listing or other public listing within the state for the company, or for an employee or representative of the company in that capacity, or other indications through advertising or business literature that the company or its employee or representative can be contacted at a specific address within the state;

b. The normal distribution and use of business cards and stationery identifying the employee's or representative's name, address, telephone and fax numbers, and affiliation with the

company shall not, by itself, be considered as advertising or otherwise publicly attributing an office to the company or its employee or representative; or

c. The maintenance of any office or other place of business in this state that does not strictly qualify as an "in-home" office as described in this paragraph shall, by itself, cause the loss of protection under this subsection;

2. The use of the office is limited to:

a. Soliciting and receiving orders from customers;

b. Transmitting orders outside the state for acceptance or rejection by the company; or

c. Other activities that are protected under Pub.L. 86-272, codified as 15 U.S.C.A. 381 to 384 or under this administrative regulation;

(w) Entering into franchising or licensing agreements, selling or otherwise disposing of franchises and licenses, or selling or otherwise transferring tangible personal property pursuant to the franchise or license by the franchisor or licensor to its franchisee or licensee within the state; or

(x) Conducting any other activity which is not entirely ancillary to the solicitation of orders, even if the activity helps to increase purchases.

Section 4. "Doing Business". An analysis to determine if a corporation or pass-through entity's activities fall within the provisions of KRS 141.010(25) shall include the factors established in this section. (1) The activities listed in this subsection shall serve as examples of "doing business" under KRS 141.010(25)(f):

(a) Performing services in Kentucky, whether directly by the corporation or pass-through entity or indirectly by directing activity performed by a third party;

(b) Accepting orders in Kentucky;

(c) Operating a professional sports team which engages in professional sports activities in Kentucky;

(d) Owning an interest in mineral rights in Kentucky, including interests in coal, oil, or natural gas;

(e) Leasing motion picture films to movie theaters and television stations in Kentucky;

(f) Being the member of a single member limited liability company that is doing business in Kentucky and is disregarded for federal income tax purposes;

(g) Being a member, partner, or shareholder in a pass-through entity doing business in Kentucky; or

(h) Receiving income from intangible personal property if the intangible personal property has acquired a Kentucky business situs.

(2) The activities listed in this subsection shall serve as examples of "doing business" under KRS 141.010(25)(g):

(a) Performing or soliciting orders for services in Kentucky, including those services performed in Kentucky by a third party on behalf of a corporation or pass-through entity;

(b) Selling or soliciting orders for real property;

(c) Selling or soliciting orders for intangible personal property;

(d) Selling tangible personal property; or

(e) Delivering merchandise inventory on consignment to its Kentucky distributors or dealers.

(3) A corporation or pass-through entity may be considered doing business under KRS 141.010(25)(d) without having employees in Kentucky. If activities are performed in Kentucky by a third party on behalf of the corporation or pass-through entity, the corporation or pass-through entity shall be considered doing business in Kentucky.

(4)(a) General.

1. The activities in this paragraph shall not, in themselves, subject a corporation to Kentucky

corporation income tax or a pass-through entity to a Kentucky filing requirement.

2. These exempted activities shall not relieve a corporation from Kentucky corporation income tax if the corporation is otherwise subject to Kentucky corporation income tax and shall not relieve a pass-through entity from a Kentucky income tax filing requirement if the pass-through entity is otherwise required to file a Kentucky return.

3. Mere ownership of a corporation that is doing business in Kentucky shall not subject the owner to the requirements. However, based on additional facts and circumstances, sufficient contacts with Kentucky may exist to establish that the corporation or pass-through entity is doing business in Kentucky. The activities listed in this subparagraph shall serve as examples of facts and circumstances that establish that the corporation or pass-through entity is doing business in Kentucky:

a. Being the parent corporation of a qualified real estate investment trust subsidiary that is doing business in Kentucky;

b. Being the parent corporation of a qualified subchapter s subsidiary that is doing business in Kentucky;

c. Being the member of a single member limited liability company that is doing business in Kentucky and is disregarded for federal income tax purposes;

d. Being a related corporation doing business in Kentucky which is performing activities as the corporation's or pass-through entity's agent in Kentucky;

e. Receiving income from a contract between a corporation or pass-through entity and a related corporation doing business in Kentucky if the income is derived from the related corporation's activities in Kentucky;

f. Being a corporation that is essentially a shell corporation, or other facts indicate that an independent corporate existence is essentially disregarded; or

g. Entering into franchising or licensing agreements and receiving income from franchising or licensing agreements that have acquired a Kentucky business situs.

(b) Employee or independent agent activity. A foreign corporation or pass-through entity that is not otherwise doing business in Kentucky may be considered to not be doing business in Kentucky, even if its employees or independent agents are performing certain de minimis activities in Kentucky. The following items shall serve as examples of de minimis activities:

1. A foreign corporation or pass-through entity sending various employees, e.g., legal staff and witnesses, to assist its independent legal counsel in defending a lawsuit in Kentucky. The law firm providing counsel shall be taxable in Kentucky;

2. A foreign corporation or pass-through entity sending its employees to Kentucky to purchase raw materials and inventory;

3. A foreign corporation or pass-through entity giving its highest performing sales person an expense paid vacation to Lake Barkley, Kentucky; or

4. A foreign corporation or pass-through entity sending its business records to Kentucky for use by its independent auditors.

Section 5. This administrative regulation shall apply to taxable years beginning on or after January 1, 2005. (32 Ky.R. 1824; 33 Ky.R. 67; eff. 8-7-2006; 44 Ky.R. 1091, 1810; eff. 3-9-2018.)